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***Exempt From Filing Fees Pursuant To California Government Code §6103***

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

YAXIAN FAN

**Plaintiff**

VS

CITY OF NEWPORT BEACH; and  
KEITH E. RODENHUIS

## Defendants

Case No.: 8:22-CV-02178-FWS-(DFMx)

**DEFENDANT KEITH E. RODENHUIS'  
NOTICE OF MOTION AND MOTION  
TO DISMISS SECOND AMENDED  
COMPLAINT**

**DATE:** January 25, 2024  
**TIME:** 10:00 a.m.  
**JUDGE:** Hon. Fred W. Slaughter  
**DEPT :** 10D

**TO THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

NOTICE IS HEREBY GIVEN THAT on January 25, 2024 at 10:00 a.m. before the Honorable Fred W. Slaughter in Courtroom 10D of the United States Courthouse for the Central District of California, Southern Division, 411 West 4th Street, Santa Ana, California, Defendant KEITH E. RODENHUIS (“Defendant” or “Rodenhuis”) will and

1 hereby does move the Court to dismiss the Second Amended Complaint (“SAC”) for  
2 “Response Civil Minutes to Pursuant Fair Justice and Children’s Safety, Continue for the  
3 Scheduled Court Trial on May 16, 2024” (Docket No. 31) pursuant to *Federal Rule of*  
4 *Civil Procedure*, Rule 12(b)(6) for failure to state a claim upon which relief can be  
5 granted.

6 Pursuant to Local Rule 7-3, on November 14, 2023, Rodenhuis’ counsel sent  
7 Plaintiff, Yaxian Fan (“Plaintiff” or “Fan”) a meet and confer letter identifying the  
8 defects of Plaintiff’s lawsuit. On November 15, 2023, counsel for Rodenhuis also spoke  
9 with Fan to confer. Counsel explained that Plaintiff could not sue under the federal  
10 question jurisdiction as the *Noerr-Pennington* doctrine immunized the City’s defense  
11 counsel from the allegations alleged in her SAC, but efforts to educate and persuade Ms.  
12 Fan to dismiss her SAC failed. The parties were unable to reach a resolution other than  
13 to the date for hearing of the motion. Decl. of Rodger S. Greiner, ¶ 2-5.

14 As set forth in the accompanying Memorandum of Points and Authorities, there is  
15 good cause for the relief requested. Plaintiff fails to state a claim upon which relief can  
16 be granted. Specifically, Plaintiff fails to allege facts showing any question of federal  
17 law. Instead, Plaintiff is alleging a conspiracy between KER Legal Group and the entire  
18 state court system arising out of her general negligence case for personal injuries. Yet  
19 Plaintiff still fails to assert any articulable cause of action against Rodenhuis. Instead,  
20 the Defendants’s conduct as alleged in the SAC is protected under the *Noerr-Pennington*  
21 doctrine.

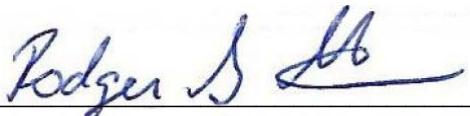
22 This Motion is based on this Notice of Motion and Motion; the accompanying  
23 Memorandum of Points and Authorities; Declaration of Rodger S. Greiner; the pleadings  
24 and papers filed in this action; and such further argument and matters as may be offered  
25 at the time of the hearing of this Motion.

26 //  
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1 DATED: November 21, 2023  
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Respectfully submitted,  
**KER LEGAL GROUP**

5 By:

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Rodger S. Greiner, Esq.  
Attorney for Defendant,  
Keith E. Rodenhuis

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1                   **I. INTRODUCTION**

2                   Plaintiff, YA XIAN FAN, (“Fan” or “Plaintiff”) initially filed this suit against  
3 defendant City of Newport Beach for injuries she sustained **on May 15, 2018 – over**  
4 **four and a half years ago** - when she jumped off a lifeguard tower near 1600 W Balboa  
5 Blvd in Newport Beach, California. (See, Docket No. 1).

6                   Plaintiff’s original Complaint sued under diversity jurisdiction (See Docket No.  
7 1). Thereafter, Plaintiff filed a First Amended Complaint (“FAC”) which was dismissed  
8 by way of the City’s granted Motion to Dismiss. Plaintiff’s Premises Liability Claim was  
9 dismissed without leave to amend. Plaintiff’s 42 U.S.C. §1983 Claim was dismissed  
10 with leave to amend.

11                  In her Second Amended Complaint (“SAC”), Plaintiff adds Defendant KEITH E.  
12 RODENHUIS (“Defendant” or “Rodenhuis”)<sup>1</sup> as a defendant in this action seeking to  
13 recover for unknown damages relating to attorney Rodenhuis’ representation of  
14 defendant City of Newport Beach in California State Court. See, Orange County  
15 Superior Court (“OCSC”) Case No. 30-2019-01072057-CU-PO-NJC. Plaintiff now  
16 “files 2nd amended complaint for response civil minutes to pursuant fair justice and  
17 children’s safety, continue for the scheduled court trial on May 16, 2024.”

18                  While this is Plaintiff’s third attempt to file a meritorious federal lawsuit against  
19 the City and now against defense counsel, Keith E. Rodenhuis, the defects of the  
20 Plaintiff’s Second Amended Complaint, as addressed in the Court’s Minute Order  
21 granting the City’s Motion to Dismiss the FAC, remain in the SAC.

22                  Plaintiff’s 42 U.S.C. §1983 claim against Mr. Rodenhuis must be dismissed for  
23 the same reasons it was previously dismissed from the FAC. The City’s defense  
24 counsel’s conduct is immune under the *Noerr-Pennington* doctrine. Plaintiff failed to  
25 correct *any* of the fatal defects in her FAC and therefore, the case should be dismissed  
26 with prejudice. No further amendment will cure these defects.

27                  

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<sup>1</sup> Defendants City of Newport Beach and Keith E. Rodenhuis collectively referred to  
28 herein as “Defendants”.

1                   **II. FACTS AND PROCEDURAL BACKGROUND**

2                   On May 15, 2018, Plaintiff, a 66-year-old California citizen and resident of Irvine,  
 3 California, went to the beach with her family. Plaintiff walked the beach and decided to  
 4 take a break to soak in the bayside views. Plaintiff saw an unmanned lifeguard tower and  
 5 decided it was the perfect place to rest. She climbed to the top platform where she sat  
 6 with her legs dangling for approximately ten (10) minutes before deciding to jump  
 7 down. As her feet hit the sand, the momentum caused her to fall forward into the sand  
 8 thereby (allegedly) injuring her left arm and side.<sup>2</sup>

9                   On May 24, 2019, Plaintiff filed a civil action in Orange County Superior Court  
 10 (“OCSC”) for the exact same claims and set of facts as the instant case. See, OCSC Case  
 11 No. 30-2019-01072057-CU-PO-NJC. Plaintiff’s OCSC case was dismissed by way of a  
 12 motion for summary judgment which the Court of Appeal, Fourth District affirmed.  
 13 Plaintiff’s petition for review was also denied by the California Supreme Court.  
 14 Plaintiff’s claim has already been fully adjudicated. Plaintiff is now suing in federal  
 15 district court pursuant to 28 U.S.C. § 1331: Federal Question.

16                   The SAC essentially alleges Defendants allowed the OCSC courtroom clerk to  
 17 hold onto Plaintiff’s documents, recovered costs against Plaintiff as the prevailing party  
 18 in that suit, and filed and later withdrew a sanctions motion against Plaintiff. Specifically,  
 19 Plaintiff asserts numerous allegations<sup>3</sup> against the City – all of which, if accepted as true,  
 20

---

21                   <sup>2</sup> These facts were undisputed in the motion for summary judgment filed in the Orange  
 22 County Superior Court by Defendant City of Newport Beach. The City’s motion was  
 23 granted, and the Plaintiff’s appeal denied. See, OCSC Case No. 30-2019-01072057-  
 24 CU-PO-NJC. While not germane to this motion, the City includes them to provide the  
 Court with case background and context.

25                   <sup>3</sup> See SAC, p. 2:13-15; SAC, p. 2:21-24; SAC, p. 2:26-3:2; SAC, p. 3:3-6; SAC, p. 3:13-  
 26 16; SAC, p. 4:8-12; SAC, p. 8:20-25; SAC, p. 9:1-4; SAC, p. 10:3-9; SAC, p. 10:26-28;  
 27 SAC, p. 11:5-6; SAC, p. 11:28-12:5; SAC, p. 12:22-23; SAC, p. 14:5-9; SAC, p. 15:26-  
 28 16:2; SAC, p. 16:19-21; SAC, p. 17:2-3; SAC, p. 17:17-22; SAC, p. 17:25-26; SAC, p.  
 18:1; SAC, p. 18:15-19; SAC, p. 20:2-6.

1 are protected under the *Noerr-Pennington* doctrine.

2 Plaintiff presents this SAC in an attempt to delay paying costs owed the City  
 3 related to the Superior Court lawsuit and for the improper purpose of harassing the City  
 4 of Newport Beach and its counsel for diligently defending the California state claims  
 5 against the City and being the prevailing party.

6 **III. ARGUMENT AND MEMORANDUM OF LAW**

7 **A. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM  
 UPON WHICH RELIEF CAN BE GRANTED PER F.R.C.P., RULE 12(b)(6).**

8 A complaint may be dismissed for failure to state a claim “where there is no  
 9 cognizable legal theory or an absence of sufficient facts alleged to support a cognizable  
 10 legal theory.” *Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007). In considering  
 11 whether a complaint states a claim, a court must accept as true all of the material factual  
 12 allegations in it. *Hamilton v. Brown*, 630 F.3d 889, 892-93 (9th Cir. 2011). However,  
 13 the court need not accept as true “allegations that are merely conclusory, unwarranted  
 14 deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d  
 15 1049, 1055 (9th Cir. 2008).

16 Although a complaint need not include detailed factual allegations, it “must  
 17 contain sufficient factual matter, accepted as true, to state a claim to relief that is  
 18 plausible on its face.” *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting  
 19 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A  
 20 claim is facially plausible when it “allows the court to draw the reasonable inference  
 21 that the defendant is liable for the misconduct alleged.” *Id.* The complaint “must  
 22 contain sufficient allegations of underlying facts to give fair notice and to enable the  
 23 opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th  
 24 Cir. 2011).

25 “A document filed pro se is ‘to be liberally construed,’ and a ‘pro se complaint,  
 26 however inartfully pleaded, must be held to less stringent standards than formal

1 pleadings drafted by lawyers.’’ *Woods v. Carey*, 525 F.3d 886, 889-90 (9th Cir. 2008).  
 2 However, liberal construction should only be afforded to ‘‘a plaintiff’s factual  
 3 allegations,’’ *Neitzke v. Williams*, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827, 104 L. Ed. 2d  
 4 339 (1989), and the Court need not accept as true ‘‘unreasonable inferences or assume  
 5 the truth of legal conclusions cast in the form of factual allegations.’’ *Ileto v. Glock Inc.*,  
 6 349 F.3d 1191, 1200 (9th Cir. 2003).

7           **B. PLAINTIFF’S 42 U.S.C. SECTION 1983 CLAIM FAILS.**

9           To the extent Plaintiff alleges a 42 U.S.C. section 1983 claim against Defendant  
 10 based on his litigation conduct, Plaintiff’s allegations all relate to conduct protected  
 11 under the *Noerr-Pennington* doctrine and the SAC does not plausibly allege facts  
 12 suggesting the ‘‘sham’’ exception to that doctrine applies.

13           ‘‘The *Noerr-Pennington* doctrine . . . provides that litigation activity (including  
 14 pre-litigation cease-and-desist letters) cannot form the basis of liability unless the  
 15 litigation is a ‘sham.’’’ *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 532 n.1 (9th  
 16 Cir. 2022) (quoting *Rock River Commc’ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d  
 17 343, 347 n.1 (9th Cir. 2014)) (citations omitted); *see also Empress LLC v. City & Cnty.  
 18 of S.F.*, 419 F.3d 1052, 1056 (9th Cir. 2005) (“Under the *Noerr-Pennington* doctrine,  
 19 those who petition all departments of the government for redress are generally immune  
 20 from liability” and immunity thereunder “applies to claims under § 1983 that are based  
 21 on the petitioning of public authorities”). The doctrine extends “to litigation activities  
 22 by government actors and their attorneys.” *B&G Foods N. Am.*, 29 F.4th at 536; *see*  
 23 *also Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009)) (“The  
 24 agents of that litigation—employees and law firms and lawyers—may benefit from the  
 25 immunity as well.”).

26           To determine whether the *Noerr-Pennington* doctrine immunizes a party’s  
 27 conduct, the court performs a three-step analysis that examines: ‘‘(1) ‘whether the lawsuit  
 28 imposes a burden on petitioning rights,’ (2) ‘whether the alleged activities constitute

1 protected petitioning activity,’ and (3) ‘whether the statute[ ] at issue may be construed to  
 2 [avoid] that burden.’” *Id.* at 535 (quoting *Kearney*, 590 F.3d at 644). If the answer to each  
 3 step is “yes,” then the City and defense counsel’s conduct is immunized. *Ibid.*

4 As explained below, and as the Court has previously determined (see, Docket  
 5 No. 28 – Court Minute Order re. Motion to Dismiss FAC), the answer to each step of  
 6 the *Noerr-Pennington* doctrine analysis as to Plaintiff’s claims is “yes” and the  
 7 Defendant’s conduct is therefore protected.

8       **1. Step 1: Fan’s Suit Burdens the City’s Petitioning Rights.**

9       Step one of the *Noerr-Pennington* doctrine analysis asks, “whether the success of  
 10 [Plaintiff’s] lawsuit would constitute a burden on petitioning rights.” *Kearney*, 590 F.3d  
 11 at 645. In conducting this inquiry, the court does not consider any alleged misconduct  
 12 tied to the petitioning activities. *Id.* Rather, when the petitioning activity is incidental to  
 13 the prosecution of a suit, the question is whether plaintiff’s lawsuit “places a burden on  
 14 [defendant’s] ability” to prosecute its suit. *Id.*

15       At the first step, the SAC challenges defensive petitioning activity by the City  
 16 and defense counsel such that “the success of [Plaintiff’s] lawsuit would constitute a  
 17 burden on petitioning rights.” See *Kearney*, 590 F.3d at 645. In the present case, the  
 18 Defendants’ lobbying was directed at two distinct ends—opposing Plaintiff’s case  
 19 against the City of Newport Beach and stopping the harassing filing of documents  
 20 against the City once the Court granted the City’s Motion for Summary Judgment and  
 21 Plaintiff’s case was effectively over.

22       Accordingly, the answer to the first step of the *Noerr-Pennington* doctrine  
 23 analysis is “yes”.

24       **2. Step 2: Defendant’s Conduct is Protected Petitioning Activity.**

25       The federal courts have determined that protected petitioning activity extends to  
 26 litigation activities by government actors and their attorneys by holding that conduct  
 27 related to an eminent domain suit, which allegedly violated § 1983, was protected  
 28

1 petitioning. *Kearney*, 590 F.3d at 644– 45. “*Noerr-Pennington* immunity, and the  
 2 sham exception, also apply to defensive pleadings . . . because asking a court to deny  
 3 one's opponent's petition is also a form of petition . . .” (citation omitted). *Freeman v.*  
 4 *Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005).

5 The activities alleged in the SAC, namely filing motions in state court and  
 6 litigating the case, constitute petitions and “conduct incidental to the prosecution of the  
 7 suit” is protected by the *Noerr-Pennington* doctrine. *See Sosa v. DIRECTV, Inc.*, 437  
 8 F.3d 923, 933 (9th Cir. 2006) (stating “litigation activities which constitute  
 9 communications to the court may be fairly described as petitions,” including “[a]  
 10 complaint, an answer, a counterclaim and other assorted documents and pleadings, in  
 11 which plaintiffs or defendants make representations and present arguments to support  
 12 their request that the court do or not do something”) (internal quotation marks,  
 13 alterations, and citations omitted); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180,  
 14 1184 (9th Cir. 2005).

15 Again, the answer to the second step of the *Noerr-Pennington* doctrine analysis is  
 16 “yes”.

17       **3. Step 3: §1983 Cannot Be Construed to Avoid Burdening**  
 18       **Defendant's Protected Petitioning Activity.**

19       The federal courts ask at step three whether the statute—here 42 U.S.C. § 1983—  
 20 can be construed to avoid burdening Defendants' Petition Clause rights. *See Sosa*, 437  
 21 F.3d at 931; see also *id.* at 932 (“Where ... the burdened conduct could fairly fall within  
 22 the scope of the Petition Clause and a plausible construction of the applicable statute is  
 23 available that avoids the burden, we must give the statute the reading that does not  
 24 impinge on the right of petition.”).

25       At the third step, Plaintiff has not identified any aspect of section 1983 that  
 26 proscribes the City and defense counsel's litigation conduct at issue here. *See, e.g.,*  
 27 *Williams v. Jones & Jones Mgmt. Grp.*, 2015 WL 349443, at \*9 (C.D. Cal. Jan. 23,  
 28 2015) (finding plaintiff's § 1983 claim, *inter alia*, barred by the *Noerr-Pennington*

1 doctrine where plaintiff did not identify how § 1983 proscribed defendants' litigation  
 2 activities).

3 Thus, the *Noerr-Pennington* doctrine bars Plaintiff's section 1983 claims against  
 4 the City and defense counsel unless a sham exception applies.

5       **4. The Sham Exception to the *Noerr-Pennington* Doctrine  
 6 Does Not Apply.**

7       The Ninth Circuit has identified "three circumstances in which the sham  
 8 litigation exception might apply," including: (1) "where the lawsuit is objectively  
 9 baseless and the [party's] motive in bringing it was unlawful"; (2) "where the conduct  
 10 involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings  
 11 without regard to the merits' and for an unlawful purpose"; and (3) "if the allegedly  
 12 unlawful conduct 'consists of making intentional misrepresentations to the court,  
 13 litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional  
 14 misrepresentations to, the court deprive the litigation of its legitimacy.'" *Sosa*, 437 F.3d  
 15 at 938 (quoting *Kottle v. NW. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998)). Here,  
 16 Plaintiff does not adequately allege that her section 1983 claims fall within a "sham"  
 17 exception to the *Noerr-Pennington* doctrine.

18       **"A winning lawsuit is** by definition a reasonable effort at petitioning for redress  
 19 and therefore **not a sham."** *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000)  
 20 (emphasis added).

21       With respect to the first sham exception, Plaintiff has not sufficiently alleged that  
 22 the City and defense counsel's defense was "baseless" such that "no reasonable litigant  
 23 could realistically expect success on the merits" ***because that judgment was entered in  
 24 the City's favor*** (and thus a "winning lawsuit") in the state court suit. *B&G Foods N.  
 25 Am.*, 29 F.4th at 538; *see also White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000).

26       The second sham exception does not apply because Plaintiff does not allege "a  
 27 series of lawsuits." *See id.* Instead, Plaintiff only makes allegations relating to a single  
 28 lawsuit (Orange County Superior Court Case No. 30-2019-01072057-CU-PO-CJC).

1           Finally, with respect to the third sham exception, Plaintiff has not adequately  
2 alleged any intentional misrepresentations that the City or defense counsel made to the  
3 court during the state court proceedings. *See Sosa*, 437 F.3d at 938.

4           For all the foregoing reasons, Plaintiff's section 1983 claim against Defendant  
5 Keith E. Rodenhuis is barred by the *Noerr-Pennington* doctrine.

6                          **IV. CONCLUSION.**

7  
8           As a matter of law, the Plaintiff's lawsuit is without merit and frivolous. The  
9 Second Amended Complaint fails to articulate a basis for this Court to have  
10 jurisdiction. On its face, all Plaintiff's allegations relate to conduct protected under the  
11 *Noerr-Pennington* doctrine and the SAC does not plausibly allege facts suggesting the  
12 "sham" exception to that doctrine applies. Ms. Fan has failed to provide any other basis  
13 for federal jurisdiction.

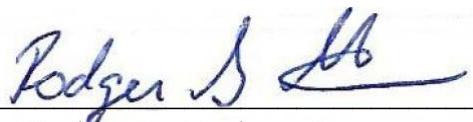
14           Accordingly, Defendant Keith E. Rodenhuis respectfully requests that this  
15 Motion to Dismiss be granted, with prejudice.

16  
17 DATED: November 21, 2023

Respectfully submitted,

**KER LEGAL GROUP**

20 By:



Rodger S. Greiner, Esq.  
Attorney for Defendant,  
Keith E. Rodenhuis